IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRL JENKINS MAYS et al.	PLAINTIFFS
vs.	CIVIL NO. 1:96cv8-D-D
NATIONAL BANK OF COMMERCE et al.	DEFENDANTS/ THIRD-PARTY PLAINTIFFS
vs.	
WESCO INSURANCE et al.	THIRD-PARTY DEFENDANTS

OPINION

Presently before the court is Third-Party Defendant Wesco Insurance Company's Motion to Dismiss the third-party complaint filed by Ross & Yerger, P.A. (RYPA), Ross & Yerger, Inc. (RYI), and Ross & Yerger Financial Systems (RYFS). Upon due consideration, the court finds that the motion is well-taken and that the third-party complaint should be dismissed with prejudice.

Factual Background

National Underwriters, Inc., (NU) was a managing general agent at various times for certain insurance companies including Wesco Insurance. RYI entered into an agreement with NU as a producing agent on a commission basis for disclosed principles in which RYI sold master policies of collateral protection insurance to National Bank of Commerce (NBC). These policies were filed with and approved by the Mississippi Department of Insurance. The third-party complaint asserts that NU, as managing general agent, and Wesco, among others, as an entity which wrote the policies upon which Plaintiff Shirl Jenkins Mays[1] and other putative class

[1]Although Steven Brand actually filed the original complaint, Shirl Jenkins Mays was substituted as proposed class representative by order of the Magistrate Judge dated July 18, 1996.

members base their claims, represented to RYI that the policies and associated collateral protection insurance programs were lawful. Moreover, RYI asserts that it reasonably relied upon these representations. Accordingly, RYI argues that if it has any liability to the plaintiff or any putative member, Wesco, among others, would be entitled to indemnity, including all litigation expenses and payment of any judgment which might be entered against them.

Wesco Insurance's motion to dismiss does not attack the allegations of the third-party complaint. Instead, Wesco asserts that the arbitration clause of the Agency Agreement between RYFS and Wesco mandates dismissal of the third-party claims in favor of resolution by arbitration.

Discussion

The Agency Agreement between the parties now before this court included an "Arbitration" section which stated, "[a]ny controversy or claim arising out of or relating to this Agreement and all disputes or differences arising out of the interpretation of the Agreement, or the breach thereof, which cannot be resolved amicably, shall be settled by arbitration." The Federal Arbitration Act declares the following:

> A written provision in... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract..., or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Ross & Yerger argue that arbitration should be enjoined pursuant to Mississippi's common law rule holding that an agreement to arbitrate is not enforceable prior to an award.

For brevity's sake and to avoid confusion, the court shall simply refer to the named plaintiff as Ms. Mays throughout this action.

(Third-Party Plaintiff's Reply Supplemental Memorandum to the Motion to Dismiss, p. 4). The court finds that this assertion is not well-taken and that the Federal Arbitration Act preempts the Mississippi common law rule regarding arbitration clauses. See Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 270, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995).

The third-party complainant asserts that the contractual forum, Wesco's "administrative and executive offices currently located in Wilmington, Delaware, or an alternative site otherwise mutually agreed to by the parties,"[2] would be so "gravely difficult and inconvenient that [RYFS] will for all practical purposes be deprived of [its] day in court." (Third-Party Plaintiff's Reply Supplemental Memorandum to the Motion to Dismiss, p. 2-3 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 15, 18; 92 S. Ct. 1907, 1914, 1916, 1917; 32 L. Ed. 2d 513 (1972)). Ross & Yerger asserts that since all of its employees live in Mississippi,[3] its corporate headquarters are located in Mississippi, and all of its offices are located in Mississippi, that to require the Ross & Yerger companies to arbitrate in a distant forum would involve an inconvenience and "duplication of time and effort which would severely undermine the ability of Ross & Yerger to function effectively as a competitive Mississippi insurance agency." (Third-Party Plaintiff's Reply Supplemental Memorandum to the Motion to Dismiss, p. 3).

In Bremen, the United States Supreme Court held that a contractual forum clause should control absent a strong showing that its enforcement would be unreasonable and unjust, or that the clause is invalid for such reason as fraud. Bremen, 407 U.S. at 15. However, the Court of

---

2 The court notes that Wesco's executive and administrative offices are now located in Peapack, New Jersey. (Third-Party Defendant's Rebuttal Memorandum in Support of the Motion to Dismiss Third-Party Complaint, p.3.).

3 The court notes that one Ross & Yerger employee works out of her home in Louisiana.

Appeals for the Fifth Circuit has held that Bremen is not applicable to arbitration clauses; rather, the Federal Arbitration Act exclusively governs arbitration clauses. Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 680-81 (5th Cir. 1976). "Under the Act, a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or 'such grounds as exist at law or in equity for the revocation of any contract.'" Reisfeld, 530 F.2d at 681 (citing 9 U.S.C. § 2)(other citations omitted). This court finds that there is no evidence to indicate that the arbitration clause was the result of fraud, coercion, or that any other ground exists to justify revocation of the arbitration clause. In any event, this court finds that the third-party plaintiff has not carried its burden under the Bremen standard. Duplication of time and effort is not a legitimate reason to set aside an arbitration agreement. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 939, 74 L. Ed. 2d 765 (1983). Furthermore, arbitration clauses that were more burdensome than the one at issue have been consistently upheld. See Peterson v. Test Intern. E.C., 904 F. Supp. 574, 580-81 (S.D. Miss. 1995) (upholding forum selection clause specifying Bahrain); Hunter Dist. Co. v. Pure Beverage Partners, 820 F. Supp. 284, 287 (N.D. Miss. 1993) (upholding forum selection clause specifying Arizona). Accordingly, this court finds that the arbitration clause and the forum selection clause within it shall stand.

Finally, Ross & Yerger asserts that if any of its companies are held to be subject to the arbitration agreement, then only Ross & Yerger Financial Systems (RYFS) should be subject to the agreement since the agreement only states RYFS as a party to the agreement. In Reisfeld, the Fifth Circuit held that when the agency agreement is based on the same "operative facts and [are] inherently inseparable from the claims" of its corporate affiliates, the affiliates' claims are also

arbitrable. Reisfeld, 530 F.2d at 681. Accordingly, the court finds that Ross & Yerger, P.A., Ross & Yerger, Inc., and Ross & Yerger Financial Systems are all subject to the arbitration agreement and that the third-party complaint should be dismissed with prejudice. A separate order in accordance with this opinion shall issue this day.

This the ____ day of November 1998.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRL JENKINS MAYS et al. PLAINTIFFS

vs. CIVIL NO. 1:96cv8-D-D

NATIONAL BANK OF COMMERCE et al. DEFENDANTS

vs.

WESCO INSURANCE, et al. THIRD-PARTY DEFENDANTS

ORDER

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED that

(1) the Defendant's Motion to Dismiss the Third-Party Complaint is GRANTED; and

(2) the Third-Party Complaint is DISMISSED WITH PREJUDICE.

SO ORDERED, this the _____ day of November 1998.

_____
United States District Judge